



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1991

PFZ PROPERTIES, INC.,  
*Petitioner,*

v.

RENE ALBERTO RODRIGUEZ, *et al.*,  
*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIRST CIRCUIT**

**PETITIONER'S REPLY BRIEF**

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Petitioner PFZ Properties, Inc. ("Petitioner" or "PFZ") hereby submits its reply to Respondents' Brief in Opposition to the Petition for Certiorari ("Opposition" or "Opp.").

## INTRODUCTION

The decision of the Court of Appeals presented the two narrowly drawn issues of constitutional due process which form the basis for PFZ's Petition for a Writ of Certiorari ("Petition"). This was done within the context of the Amended Complaint assuming the allegations as true and drawing all reasonable inferences in favor of the Petitioner. Although PFZ submits that the legal arguments relied upon by the Court below are inconsistent with prior Supreme Court precedent and the decisions of numerous other Circuits, the factual framework for the decision below was straightforward.

Respondents' Brief in Opposition does not dispute the existence of a conflict in the circuits on the issues of due process decided by the Court below. Respondents' arguments essentially consist of an unsuccessful attempt to distinguish *Zinermon v. Burch*, 494 U.S. \_\_\_, 110 S.Ct. 975 (1990), and a number of factual arguments that depart from the allegations and inferences ascribed to the Amended Complaint by the Court of Appeals.<sup>1</sup>

## PROCEDURAL DUE PROCESS

The facts essential to PFZ's procedural due process claim were set forth succinctly by the Court of Appeals. PFZ's Amended Complaint alleged a deprivation of a

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<sup>1</sup> Most of Respondents' factual arguments either played no role in the Court's decision below or are disputed facts at the trial level which need not be resolved to reach the issues raised in the Petition. Petitioner notes, however, that the record below is complete, since this case was dismissed on the eve of trial after the pretrial order was entered. The factual record developed by Petitioner before the District Court is a rich one, which amply supports its claims. Despite Respondents' efforts to confuse the facts, the statement of the case in the Petition is accurate.

property interest<sup>2</sup> without the benefit of prior notice or an opportunity to be heard. The process by which the deprivation occurred violated ARPE custom and procedure. That deprivation was effected by the deliberate action of the head of the Agency acting in concert with senior subordinates. The deprivation resulted in an alleged denial of procedural due process.

These facts justify granting the Petition in light of the constitutional issues left unresolved by *Zinermon v. Burch*, 494 U.S. \_\_\_, 110 S.Ct. 975 (1990), and numerous circuit decisions. See Petition at 9-11 and cases cited therein. *Zinermon* found actionable procedural due process violations to exist when (1) state officials were delegated power and authority to effect the deprivation complained of, and (2) the state delegated an accompanying duty to initiate procedural safeguards to prevent the deprivation. 494 U.S. at \_\_\_, 110 S.Ct. at 990. In such circumstances, the Court found that the state officials' conduct could not be "random and unauthorized" within the meaning of the *Parratt* exception. See discussion in Petition at 8-10.

*Zinermon's* facts did not present the specific question of when, if ever, actions of the head of an agency which effect a deprivation would constitute "random and unauthorized" conduct such that *Parratt* would apply. The instant Petition does present that issue, because the personal involvement of the Respondent Rodriguez as the head of the agency carried with it the endorsement of the state

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<sup>2</sup> As the Respondents note, the Court of Appeals presumed a property right existed for purposes of its analysis. The decision below therefore presents this Court with the opportunity to resolve the constitutional issue of whether the denial of predeprivation process by high government officials constitutes "random and unauthorized" conduct as contemplated by *Parratt v. Taylor*, 451 U.S. 527 (1981), in a narrowly-drawn context. Nonetheless, Petitioner disputes Respondents' arguments that PFZ did not have a property right, and relies on PFZ's arguments in its briefs below.



apparatus. As such, Rodriguez was clothed with broadly delegated authority to effect the deprivation of PFZ's interests.

Respondents have not addressed this issue. Indeed, they do not dispute that the extent to which a state official's station and rank may confer broadly delegated power and authority so as to obviate a defense of "random and unauthorized" conduct is an issue unresolved in the Circuits. Instead, Respondents attempt to distinguish the Supreme Court's decision in *Zinermon v. Burch* by arguing that ARPE had not prescribed procedures to afford Petitioner notice and an opportunity to be heard on the dismissal. They then conclude that Rodriguez had no obligation to implement procedures to prevent the deprivation complained of and that the second element of the *Zinermon* scenario is not present.

The Court of Appeals, however, proceeded on the basis that Respondents "*illegally departed from Puerto Rico's prescribed procedures*" (emphasis added). Relying on *Parratt*, it observed that "[w]hen a deprivation of property results from conduct of state officials violative of state law, . . . failure to provide predeprivation process does not violate the Due Process Clause." *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 31 (1st Cir. 1991); Petition at A-5. It then affirmed the dismissal concluding that it made "little sense to argue that ARPE had to afford plaintiff a hearing *before it illegally departed from its own procedures*" (emphasis added) and that "[t]he state is not required to anticipate *such violations of its own constitutionally adequate procedures*" (emphasis added). *Id.* In view of the above, Respondents' distinction has no application to the case before the Court.<sup>3</sup>

<sup>3</sup> Indeed, a number of circuits have expressed the view that the grant of broadly delegated authority to a senior official to effect a deprivation may be sufficient to implicate due process if the state official merely "had the power" to provide a hearing but did not do so. See *Zinermon v. Burch*, 494 U.S. at \_\_\_, n.2, 110 S.Ct. at 978, n.2, and cases cited therein.

Moreover, Respondents' argument proceeds from an assumption that, if no drawings were filed within the specified time period, the project could be dismissed without a hearing under Puerto Rico law. However, the District Court's opinion states that "PFZ *timely submitted* to ARPE construction drawings for site improvements for the subdivision works of block 2 of the first section ('the construction drawings') *as required by the 1976 Planning Board Resolution and the 1981 ARPE Resolution*" (emphasis added).<sup>4</sup> *PFZ Properties, Inc. v. Rodriguez*, 739 F. Supp. 67, 69-70 (D.P.R. 1990); Petition at A-14 to A-15. The Court of Appeals reached essentially the same conclusion. *PFZ*, 928 F.2d at 29-30; Petition at A-3.

In any event, Respondents' argument in this regard is based on factual arguments which Petitioner refuted in the record below. Once drawings are filed in cases such as the Petitioner's, ARPE custom and procedure, as alleged in the Amended Complaint and testified to by numerous deposition witnesses,<sup>5</sup> required notice and an opportunity to be heard. The ARPE Manual of Procedures, which was before both the District Court and the Court of Appeals,

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Compare *id.*, 494 U.S. at \_\_\_, 110 S.Ct. at 994 (O'Connor dissenting) (arguing against recognition of a due process claim, *inter alia*, because petitioners in *Zinermon* were not charged with formulating policy).

<sup>4</sup> Respondents not only ignore the District Court's opinion, but purport to conduct an evaluation of the merits of PFZ's submission in their brief, albeit through misleading references to drawings for *off-site* works which were not involved in the dismissal decision. Indeed, the whole exercise appears incongruous, since Respondents admit that they had reviewed the wrong set of drawings in reaching their "decision". Opp. at 11, n.13. The record below (deposition testimony and documents) also reflects that PFZ inquired repeatedly about its drawings from the time they were filed.

<sup>5</sup> These included the Respondent Rodriguez, his principal assistants, his predecessor Administrator Motta, the author of the Manual, and every other ARPE witness who was deposed.

also required that the project proponent be provided with notice and an opportunity to be heard once drawings were filed.<sup>6</sup> While the evidence below in its favor might be characterized as overwhelming on this point, the Petitioner need not go that far.<sup>7</sup> Instead, it respectfully submits that this, like the other issues raised in the Opposition, is at best a factual issue in dispute below which should be construed in Petitioner's favor for purposes of these proceedings.

### SUBSTANTIVE DUE PROCESS

As the Respondents concede, Petitioner alleged "egregiously unacceptable, outrageous conduct on the part of respondents in connection with their decision to dismiss petitioner's case ..." Opp. at 27. While acknowledging that Petitioner had alleged arbitrary and capricious conduct, the Court below ruled upon Petitioner's claims in the context of a unique line of authority which has evolved in the First Circuit. Petition at A-6. That line of authority has put forth a standard which provides that an arbitrary, capricious or illegal denial of a building permit cannot implicate due process, *unless* the motivation is accompanied by the deprivation of *another* specific constitutional right. See *Chiplin Enterprises, Inc. v. City of Lebanon*, 712 F.2d 1524, 1528 (1st Cir. 1983). Respondents do not dispute that this standard acted to deprive the Petitioner of a substantive due process claim in the Court below. Opp. at 27. Nor do they dispute that the standard is a well-recognized departure from that applied by numerous other Circuits. See generally Petition at 13-14 and n.9, and decisions cited therein. Accordingly, the Petition should be granted to resolve this conflict in the Circuits.

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<sup>6</sup> Once the proponent files its drawings for review it must receive written notice of any "objections" and must be notified "to come and discuss the case at the [ARPE Regional] office."

<sup>7</sup> Indeed, the "Motta" letter, which Petitioner never received because of Respondents' misconduct, reflects ARPE's practice of providing notice and an opportunity to be heard in circumstances such as that involving PFZ.

### CONCLUSION

For the above reasons and those set forth in the Petitioner's principal brief, the Petition should be granted.

Respectfully submitted,

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